RECENT CASES

CONDITIONAL SALES—MORTGAGES—VALIDITY OF UNRECORDED CONDITIONAL SALE AS AGAINST PRIOR MORTGAGEE WHO MAKES ADVANCES IN RELIANCE THEREON—Mortgagee contracted with mortgagor to make advances from time to time as building operations progressed, final payment to be made after the installation of the proper furniture "absolutely free and clear of any claim".[1] Such furniture having been procured under an unrecorded conditional sale, final payment was made by mortgagee in reliance upon mortgagor's apparent ownership of said goods. Separate suits were brought by mortgagee and conditional vendor to determine their respective rights in regard to said furniture. *Held,* that the mortgagee is a purchaser within the *Uniform Conditional Sales Act,* and that his lien is paramount and superior to that of the conditional vendor. *Mississippi Valley Trust Co. v. Cosmopolitan Club,* 162 Atl. 396 (N. J. Eq. 1932).

In declaring unrecorded reservations of title void as to *bona fide* purchasers,[2] the *Uniform Conditional Sales Act* expressly included mortgagees as purchasers.[3] This was because the purpose of the Act was to protect persons who acted in reliance upon the vendee's apparent ownership of goods delivered to him under a conditional sale.[4] Consequently, the authorities are in unison to the effect that those mortgages given after the sale, and upon the strength of the vendee's possession are paramount.[5] Similarly, it is equally well settled that where the whole consideration for which the mortgage has been given, is paid prior to the delivery of the conditionally sold goods, no such protection is afforded the mortgagee.[6] By the same reasoning, it would seem that where the consideration was to be paid in installments, if such payments were unqualifiedly due under the contract, the mortgagee should not acquire a superior equity in goods conditionally sold to the

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[1] Principal case at p. 397.

[2] "Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from . . . the buyer, who, without notice of such provision, purchases the goods . . . before the contract . . . shall be filed . . ., unless such contract . . . is so filed within ten days after the making of the conditional sale." UNIFORM CONDITIONAL SALES ACT, § 5, N. J. COMP. STAT. (Supp. 1924) §§ 182-91.

[3] "Purchaser includes mortgagee." 2 U. L. A. (1922) § 1.

[4] 2 U. L. A. (1922) § 5, Commissioner's Notes. Cohen v. Fulton Avenue Corp., 251 N. Y. 24, 166 N. E. 792 (1929); Perfect Lighting Fixtures, Inc. v. Gruber Realty Corp., 228 App. Div. 141, 239 N. Y. Supp. 286 (1930); Chasnov v. Marlane Holding Co., Inc., 137 Misc. 332, 244 N. Y. Supp. 455 (1930).

[5] "As far as subsequent purchasers from the buyer are concerned the statutes are practically unanimous in protecting them." 2 U. L. A. (1922) § 5, Commissioner's Notes. (This includes mortgagees.) Diana Paper Co. v. Wheeler-Green Electric Co. *et al.,* 228 App. Div. 577, 240 N. Y. Supp. 108 (1930) (mortgagee); Alf Holding Corp. v. American Stove Co., 253 N. Y. 450, 171 N. E. 703 (1930); Shaefer v. Whitson, 32 N. M. 481, 259 Pac. 618 (1927); ESTRICH, INSTALLMENT SALES (1931) § 169; WILLISTON, SALES (2d ed. 1924) § 327a. See (1931) 80 U. OF PA. L. REV. 297.

[6] Standard Dry Kiln Co. v. Ellington, 172 N. C. 481, 90 S. E. 564 (1916); Prudence-Bonds Corporation v. 1000 Islands House Co., Inc., *et al.,* 141 Misc. 39, 252 N. Y. Supp. 60 (1930); see ESTRICH, *op. cit. supra* note 5, at § 171. A prior mortgagee with an "after-acquired" property clause is not a purchaser. Babbitt & Cowden Live Stock Co. v. Hooker, 28 Ariz. 263, 236 Pac. 722 (1925); HOAR, CONDITIONAL SALES (1929) 53. According to the common law rule, a prior mortgagee was inferior to the conditional vendor even where the chattels were affixed to the realty, DeBevoise v. Maple Avenue Construction Co., 228 N. Y. 496, 127 N. E. 487 (1920); and although the mortgage contained an after-acquired property clause, Standard Dry Kiln Co. v. Ellington, *supra. Contra:* The Massachusetts rule followed by a few states. Clary v. Owen, 15 Gray 522 (Mass. 1860); Guant v. Allen Lane Co., 128 Me. 41, 145 Atl. 255 (1929).

mortgagor subsequent to the mortgage contract but prior to payment under it.[7] On the other hand, where as in the instant case, the obligation to make the final payment would not ripen unless the furniture was installed "free and clear of any claim", it is evident that payment induced by the conditional vendee's possession would place the mortgagee, if he is not protected, in precisely the circumstances the Act intended to remedy.[8] The court, therefore, properly held that the mortgagee, upon the special facts of the instant case, was squarely within the purview of the Act.[9] Its distinguishing of this factual situation from the usual prior mortgagee case marks an important contribution to the interpretation of this Uniform Act.[10]

CONFLICT OF LAWS—SURFACE WATERS—WHAT LAW APPLIES WHERE LANDOWNER PREVENTS THE NATURAL FLOW OF WATER FROM LAND IN ANOTHER STATE—A natural shallow drain traversing plaintiff's land in Arkansas extended into defendant's adjoining land in Louisiana. Defendant erected a dam on his land across this drain, thereby impounding water on plaintiff's land. Under the Arkansas law defendant had the right to prevent the flow of the water,[1] but not under the Louisiana law.[2] Action was brought in Louisiana to have the dam removed. *Held,* that plaintiffs were entitled to rights of drainage over defendant's land in the same manner they would be if both estates were in Louisiana.[3] *Caldwell et al. v. Gore,* 143 So. 387 (La. 1932).

The problem involved in this case, apparently a novel one, may be considered from either a torts or a property aspect. Although Louisiana apparently does not have an established conflicts rule for either torts or property,[4] the common

[7] The mortgagee in such a case has not been misled. His duty to make payments being absolute, he should not be heard to plead reliance.

[8] The professed *raison d' être* of the Act is to safeguard the rights of those who have been misled by the conditional vendor's failure to record. Whether a mortgagee is prior or subsequent, is important only to the extent that it indicates his ability to rely on the delivered goods. The time of creating or filing of the mortgage contract is, then, immaterial. On the other hand, the time at which value is to be paid is all-important where, as here, the mortgagee was not required to advance the money unless the furniture was the property of the mortgagor.

[9] The result reached by the court in the principal case is strictly in accord and altogether consonant with the general policy and purpose of the Uniform Conditional Sales Act. It was this unfortunate position in which subsequent purchasers (mortgagees) were placed by the application of the common law doctrine of *caveat emptor,* that prompted the adoption of the filing requirement. Moreover, "the burden on the seller is slight, and the benefit to the public is great." 2 U. L. A. (1922) § 5 Commissioner's Notes.

[10] This eminently sound distinction is particularly significant in view of the fact that all the states which have enacted uniform laws have evinced a marked propensity toward giving much weight to decisions under those laws, whether of the same or of a foreign jurisdiction. See HOAR, *op. cit. supra* note 6, at 37; see also Hargest, *Keeping the Uniform State Laws Uniform* (1927) 76 U. OF PA. L. REV. 178.

[1] Jackson v. Keller, 95 Ark. 242, 129 S. W. 296 (1910). The Arkansas rule is generally known as the common law rule, while that of Louisiana is called the civil law rule.

[2] "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude. The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of the water. The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome." LA. REV. CIV. CODE (Dart, 1932) art. 660.

[3] This opinion was given in answer to a request by a lower court for instructions on the question of law here involved, a procedure provided for by the Louisiana constitution.

[4] However, the Code contains the same rule towards contracts, as the common law has adopted. "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed." LA. REV. CIV. CODE (Dart, 1932) art. 10.

law rule is clearly established. Whether or not an act is a tort must be determined by the law of the place where the alleged tort is committed.[5] The tort, if any, is deemed to have been committed where the injury of which the plaintiff complains was inflicted, not where the defendant's acts were done.[6] Hence, if this court had adopted the common law rule they would have had to apply the law of Arkansas allowing the defendant to maintain the obstruction. Similarly, the same result would ensue were the problem considered as one of property law. If the plaintiffs had the right to have the water flow unobstructed from their land, it was a natural right incident to the ownership of their land situated in Arkansas;[7] and "real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate".[8] Since the court was entirely unhampered by precedent in reaching its conclusion, it is conceivable that as a matter of policy they might have found it expedient to apply a different conflicts rule to an estate which directly adjoined Louisiana land than they would apply to land situated elsewhere. However, it is difficult to discern any practical reasons in this case that would justify the decision.[9] Since all of the owners of estates adjoining the plaintiffs' in Arkansas could erect dams and prevent the natural flow of surface water from the plaintiffs' land onto their land, the defendant in Louisiana, under this decision, would be forced to receive not only the natural flow but in addition the aggravated flow of all the water thrown back by the obstructions erected in Arkansas. The court apparently was so convinced

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[5] GOODRICH, CONFLICT OF LAWS (1927) 188. "The law which applies to an absolute right must be the law of the place in which it is to be exercised. . . . What is a tort, what use of property is a nuisance . . . are all determined by the law of the place where the alleged rights are to be exercised." 1 BEALE, CONFLICT OF LAWS (1916) § 157; Slater v. Mexican National R. Co., 194 U. S. 120, 24 Sup. Ct. 581 (1904); Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918).

"The law of the place of wrong governs a cause of action for tort." CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 418.

In England the doctrine is modified so that there may be recovery there if the act complained of is not justifiable where done and would have been actionable if committed in England. Machado v. Fontes [1897] 2 Q. B. 231.

[6] GOODRICH, *loc. cit. supra* note 5.

"The place of wrong is the place where conduct for which a person is claimed to be responsible first takes an effect which is claimed to be injurious upon a person or thing or the state." CONFLICT OF LAWS RESTATEMENT, § 411; Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); Cameron v. Vandegriff, 53 Ark. 381, 13 S. W. 1092 (1890).

[7] Tiffany in speaking of rights such as these says: "Such rights are not, however, as are easements, primarily rights as regards another's land, but are merely rights to the ownership of one's own land." 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 348.

[8] STORY, CONFLICT OF LAWS (6th ed. 1865) § 428.

[9] The decision would also seem to be opposed to the legislature's policy towards Servitudes as expressed in the Code. "Servitudes which tend to affect the free use of property, in case of doubt as to their extent or the manner of using them, are always interpreted in favor of the owner of the property to be affected." LA. REV. CIV. CODE (Dart, 1932) art. 753.

If the factual situation were reversed and a Louisiana landowner should sue in an Arkansas court to have a similar obstruction in Arkansas removed, under the general conflicts rule the law of Louisiana should apply and the obstruction be removed. Such a result, coupled with the decision in the instant case would effect mutuality between citizens of the two states, as no obstruction would then be allowed on either side of the border. However, it is obviously not feasible for the various states to have different conflicts rules. If Arkansas courts were to simulate this court and apply their own law there would be no mutuality. Louisiana landowners would not only have to receive the surface waters from Arkansas, but also would be unable to prevent Arkansas owners from obstructing the flow of water from Louisiana. It is true that landowners in Arkansas would suffer the same disadvantage if both states applied the general conflicts rule. But it is strikingly singular for a court to discard a generally accepted rule in order to prevent a citizen of another state from being at a disadvantage, when to do so would place the citizens of its own state at the same disadvantage.

of the desirability of applying their own law[10] that they felt justified in disregarding these practical considerations as well as the generally accepted conflicts rule.

CONSTITUTIONAL LAW—CONCLUSIVENESS OF GOVERNOR'S PROCLAMATION OF MARTIAL LAW AND ORDERS MADE PURSUANT THERETO—The Texas Railroad Commission, by virtue of a statute which empowered it to limit the production of oil in order to prevent waste,[1] ordered that production in a certain field be limited to 165 barrels per well per day. These wells, some of which were owned by the plaintiff, were capable of producing each about 5000 barrels a day. A temporary injunction against the enforcement of these orders having been granted, the Governor, under a proclamation of martial law in the oil counties, which he asserted to be in a state of riot and insurrection, ordered that for the purported purpose of quelling the insurrection, the production of oil be limited to 100 barrels per day. In an action to enjoin its enforcement, the court found as a fact that conditions did not warrant this order. *Held,* that the injunction should issue, since the order violated the due process clause of the fourteenth amendment. *Sterling, Governor of Texas, et al. v. Constantin et al.,* 53 Sup. Ct. 190 (1932).

In a line of federal cases, beginning in 1927 with *Martin v. Mott,*[2] the Supreme Court has accepted the doctrine that the power of the executive to declare martial law, or to call forth the militia to suppress invasion or insurrection, is a "political" function and of such a nature that its use must depend on quick decision and that therefore the declaration of martial law or the summoning of the militia are, per *sese,* conclusive on the court that conditions warranted such action. In the instant case the Governor contended that, by virtue of this rule, his proclamation of martial law was a veil behind which the court might not go to inquire into the validity of his order limiting oil production. Obviously, if this contention were correct, the governor's will would be law.[3] But, as the court pointed out, it is only to the extent of declaring martial law, or of ordering out the militia, that the executive's action is immune from court scrutiny, and the legality of the acts done in pursuance of the purpose in declaring martial law is a judicial question.[4] Therefore, the court properly examined the governor's lim-

[10] The court's attitude may be gleaned from this quotation from the opinion: ". . . and the rule ordained by nature that water should be allowed, so far as possible, to seek its natural outlet, is recognized and applied."

[1] TEX. REV. CIV. CODE (Vernon, Supp. 1931) arts. 6008, 6014, 6029. The statute expressly provided that it should not be construed to mean "economic waste" and "the commission shall not have the power to attempt . . . to limit the production of oil to equal the existing market demand. . . ."

[2] 12 U. S. 19 (1827). *Accord:* Luther v. Borden, 48 U. S. 1, 42 *et seq.* (1849); The Prize Cases, 67 U. S. 635 (1862); Vanderheyden v. Young, 11 Johns. 150 (N. Y. 1814).

[3] This contention has received support in West Virginia. In Nance and Mays v. Brown, 71 W. Va. 519, 77 S. E. 234 (1912) and Hatfield v. Graham, 73 W. Va. 759, 81 S. E. 533 (1914) it was held that the governor's declaration that a state of war exists, suspends all constitutional guaranties, including the privilege of the writ of habeas corpus and the right to trial by jury, and that neither the declaration nor executive acts done thereunder are reviewable by the courts. In Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235 (1909) it was held that executive acts done in pursuance of a declaration of martial law are judicially reviewable only in the question of *bona fides.* In Commonwealth v. Shortall, 206 Pa. 165, 55 Atl. 952 (1903) it was held that there is criminal liability for such acts only if they were unreasonable in the light of circumstances existing when done.

[4] Instant case at 196. *Accord:* Mitchell v. Harmony, 54 U. S. 115 (1851); *Ex parte* Milligan, 71 U. S. 2 (1866); Franks v. Smith, 142 Ky. 232, 134 S. W. 484 (1911); Bishop v. Vandercook, 228 Mich. 299, 200 N. W. 278 (1924). But see Moyer v. Peabody, *supra* note 3.

itation orders and found them contrary to due process, since the plaintiff's privilege was to extract oil subject to reasonable waste regulation by the legislature.[5] Had the limitation orders been made under appropriate legislation, similar to that of Oklahoma,[6] instead of by executive fiat, it is possible that production could have been curtailed almost to the extent contemplated by the governor's order.[7]

CONSTITUTIONAL LAW—JURISDICTION—SUBSTITUTED SERVICE ON FOREIGN CORPORATION WITHOUT NOTICE—Defendant, a foreign corporation doing business in Washington, appointed a statutory agent to receive service. Later the defendant withdrew from the state and its statutory agent also left. Plaintiff then commenced suit and, in accordance with the statute,[1] served the Secretary of State, no notice being given to the defendant. A writ of prohibition was then brought to stay further proceedings on the ground that the service was invalid. *Held,* that the service was valid. *State ex rel. Bond & Goodwin & Tucker, Inc., v. Superior Court of Spokane County et al.,* 15 P. (2d) 660 (Wash. 1932).

It is well recognized that a corporation entering a foreign state and doing business therein becomes subject to its jurisdiction,[2] whether it consents or not.[3] In either event, at least as to suits arising within the state,[4] the jurisdiction thus acquired may continue after the corporation has departed from the state.[5] The exercise of jurisdiction, however, must always comply with "due process", and there are innumerable *dicta* that notice in a judicial proceeding is an essential

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[5] Instant case at 195. For a discussion of the nature of the right of a landowner to extract oil, see Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 596 (1900).

[6] OKLA. COMP. STAT. ANN. (Harlow, 1931) 11566 *et seq.* This statute prohibits, as waste, the production of oil in excess of market demands. (The theory is that oil stored above ground is not preserved as economically as if left below the surface.) But the Texas statute, *supra* note 1, expressly forbids regulation to market demands.

[7] Orders made under the Oklahoma statute, *supra* note 6, limiting production to 6% of capacity, have been upheld. Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U. S. 210, 52 Sup. Ct. 599 (1932). The governor's order in the instant case attempted to curtail production to about 2% of capacity.

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[1] ". . . In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state . . ., then in that event service of process, . . . may be made upon the secretary of state, . . . and the same shall be held as due and sufficient service upon such corporation." 2 WASH. COMP. STAT. (Remington, 1922) § 3854.

[2] It is elementary that a foregn corporation becomes subject to suit only when it is doing business within the state. Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579 (1915); Green v. Chicago, Burlington & Quincy Ry., 205 U. S. 530, 27 Sup. Ct. 595 (1907); Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 235 (1907).

[3] Consent may take the form of an appointment of an agent for the express purpose of receiving service or by filing a written authorization with the state that some public official may receive service. That such express consent is not necessary see International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944 (1914); Henrietta Mining & Milling Company v. Johnson, 173 U. S. 221, 19 Sup. Ct. 402 (1899).

[4] There is little authority on the point as to whether suit may be brought on a cause of action arising outside of the state after the witdrawal of the corporation from the state. See Fead, *Jurisdiction Over Foreign Corporations* (1925) 24 MICH. L. REV. 633, 655. Normally while the corporation continues to do business within the state suit may be brought on a cause of action arising outside of the state if it has consented and the statute permits such suit. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93, 37 Sup. Ct. 344 (1917). That it may not be brought where the corporation did not assent see Simon v. Southern Ry., 236 U. S. 115, 35 Sup. Ct. 255 (1915).

[5] Whether the corporation remains subject to the jurisdiction after withdrawal from the state will depend on the provisions of the particular state statute. That it remains subject to suit see Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707 (1903); Home Beneficial Society of New York v. Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520 (1901); Groel v. United Electric Co. *et al.,* 69 N. J. Eq. 397, 60 Atl. 822 (1905). Holding that it was not subject to suit after withdrawal. People's Tobacco Co., Ltd. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233 (1918); Guthrie *et ux.* v. Connecticut Indemnity Ass'n, 101 Tenn. 643, 49 S. W. 829 (1899).

part of this constitutional guarantee.[6] On this account a service based on domicil where there was not a reasonable method of notice, and a service on a non-resident motorist where there was a total absence of notice have been held nullities.[7] In the case of domestic corporations the courts have invalidated statutes which did not provide for a method of service reasonably calculated to inform the defendant.[8] Does the jurisdiction over foreign corporations carry a lesser degree of protection? One answer to the problem is to be found in the decisions which hold that service on an agent who is likely to suppress the fact or fail to inform his company is void,[9] and it has been suggested that this is analogous to the case where the statute designates a public official to receive service but fails to provide for any notice.[10] It would seem that to impose such a provision upon a non-assenting corporation is clearly unconstituional.[11] The court in the instant case sought to avoid this conclusion by reasoning that here there existed "consent" to the service on the public official.[12] That an individual may waive his right to service and notice is clear from those decisions which have raised the question with regard to judgment notes,[13] but there is some doubt whether even an express consent by a foreign corporation to a blanket statute which did not provide for notice could be upheld constitutionally.[14] Moreover, it is difficult to see how the court reached its conclusion that the corporation assented to this portion of the statute. If based on the fact that the defendant had previously appointed an agent, it would seem that the extent of the consent would be limited to services on that agent, and it must be recalled that the provision under which service was actually made became operative only when defendant either failed to appoint an agent or withdrew the agent.[15] Since it appears that no actual consent can be found, to deprive the corporation of notice on some theory of constructive consent would seem to be an imposition of a condition falling under the prohibition of "due process".[16]

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[6] GOODRICH, CONFLICT OF LAWS (1927) 138.

[7] McDonald v. Mabee, 243 U. S. 90, 37 Sup. Ct. 343 (1917) (domicil); Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259 (1928) (non-resident motorist).

[8] Pinney v. Providence Loan & Investment Co., 106 Wis. 396, 82 N. W. 308 (1900).

[9] Tortat v. Hardin Mining & Mfg. Co., 111 Fed. 426 (C. C. D. S. D. 1901); Rehm v. German Ins. & Sav. Inst., 125 Ind. 135, 25 N. W. 73 (1890).

[10] See Fead, *supra* note 4, at 641.

[11] In Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295, 260 Pac. 745 (1927) a statute such as appeared in the instant case was held constitutional. This was reversed without opinion in 278 U. S. 559, 49 Sup. Ct. 17 (1928). Other decisions holding such statutes unconstitutional are Knapp *et al.* v. Bullock Tractor Co., 242 Fed. 543 (D. C. S. C. Cal. 1917); King Toponah Mining Co. v. Lynch *et al.*, 232 Fed. 485 (D. C. D. Nev. 1916); Southern Ry. Co. v. Simon, 184 Fed. 959 (E. D. La. 1910); the latter decision was reversed in Simon v. Southern Ry. Company, *supra* note 4, where the court refused to pass on the question as to the validity of the statute. *Contra:* Olender v. Crystalline Mining Co., 149 Cal. 482, 86 Pac. 1082 (1906); and see American Ry. Express Co. v. Fleischman, Morris & Co., 149 Va. 200, 214, 141 S. E. 253, 258 (1928).

[12] Principal case at 663.

[13] Cuykendall v. Dow, 129 Iowa 453, 105 N. W. 698 (1906); Hazel v. Jacobs, 78 N. J. L. 459, 75 Atl. 903 (1910); Teel v. Yost, 128 N. Y. 387, 28 N. E. 353 (1891).

[14] "In these respects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions whenever the case may be presented." Insurance Co. v. Morse, 87 U. S. 445, 451 (1874). This language would seem equally applicable to the corporate situation, and although it may be objected that such a doctrine would be too paternalistic in nature, yet to this it may be answered that the development of the doctrine of unconstitutional conditions with respect to foreign corporations has furnished just such protections. Terral v. Burke Construction Co., 257 U. S. 529, 42 Sup. Ct. 288 (1922); Hanover Fire Ins. Co. v. Harding, 272 U. S. 494, 47 Sup. Ct. 179 (1926).

[15] *Supra* note 1.

[16] "And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." McDonald v. Mabee, *supra* note 7, at 91, 37 Sup. Ct. at 343 (1917).

CONSTITUTIONAL LAW—RADIO—INTERSTATE COMMERCE—REFUSAL OF RADIO COMMISSION TO RENEW LICENSE AS VIOLATING FREEDOM OF SPEECH—The plaintiff's application for a renewal of his license to operate a broadcasting station was refused after a hearing by the Federal Radio Commission, on the ground that the public interest, convenience, or necessity, as required by the *Radio Act of 1927*,[1] would not be served by such renewal. Plaintiff had employed his station to attack religious organizations, public officials, and labor unionism, to comment upon cases pending in the courts, and in general, to utter sentiments which were sensational rather than instructive or accurate. Plaintiff contends that the refusal was a violation of the Constitutional guaranty of freedom of speech.[2] *Held,* that the Radio Act was a valid exercise by Congress of its regulatory power over interstate commerce, and that Congress may refuse a license to a person whose broadcasts would be inimical to public welfare or morality. *Trinity Methodist Church v. Federal Radio Commission,* U. S. Daily, Nov. 29, 1932, at 1736 (App. D. C.).

The Constitutional guaranty of freedom of speech and the press has taken on the crystallized meaning of immunity from previous restraints upon publication, leaving to correction by subsequent punishment any utterances which are damaging to an individual, or inimical to the public welfare.[3] In accordance with this definition, the United States Supreme Court has held unconstitutional statutes attempting to impose prior restraints upon radical utterances,[4] the display of symbols of opposition to organized government,[5] and press attacks upon the integrity of municipal officials.[6] Can it be seriously urged that, in the absence of grave abuse, the same types of publications are not within the purview of the Constitutional guaranty when uttered through the medium of the radio, merely because radio broadcasting is interstate commerce,[7] and therefore a privilege which Congress has the power to regulate, and even to deny? Such a decision directly violates the spirit of the First Amendment, since it puts it into the power of Congress to throttle that very freedom of expression which it was the intention of the framers to grant. Nor is the guaranty fulfilled by relegating the applicant to other media of publication,[8] since, if it has any vitality whatever, an individual with a message should not be precluded from choosing a medium which will assure him of the largest possible audience. While the present state of the broadcasting art does not permit the operation of an indefinite number of stations,[9]

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[1] 44 STAT. 1162, 47 U. S. C. A. §§ 81, 84 (1932).

[2] First Amendment to the Constitution of the United States: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

[3] "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." 4 BL. COMM. *151. *Accord:* Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

[4] Stromberg v. California, 283 U. S. 359, 51 Sup. Ct. 532 (1931).

[5] *Id.*

[6] Near v. Minnesota, *supra* note 3.

[7] General Elec. Co. v. Federal Radio Comm., 31 F. (2d) 630 (App. D. C. 1929); Technical Radio Lab. v. Federal Radio Comm., 36 F. (2d) 111 (App. D. C. 1929); City of New York v. Federal Radio Comm., 36 F. (2d) 115 (App. D. C. 1929); Station WBT v. Poulnot, 46 F. (2d) 671 (E. D. S. C. 1931); KFKB Broadcasting Co. v. Federal Radio Comm., 47 F. (2d) 670 (App. D. C. 1931); American Bond and Mtge. Co. v. U. S., 52 F. (2d) 318 (C. C. A. 7th, 1931).

[8] "Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander . . . but he may not . . . demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe." Principal case.

[9] DAVIS, THE LAW OF RADIO COMMUNICATION (1927) 9.

this seems to be an insufficient justification for holding that Congress may upon specious grounds restrain utterances which are perfectly legitimate when other media of publication are employed. The regulatory power of Congress should be confined to its proper Constitutional ambit: punishment after the fact.[10]

CONTRACTS—THIRD PARTY BENEFICIARIES—RIGHT OF MATERIALMAN TO RECOVER IN PENNSYLVANIA ON PROMISE OF PAYMENT MADE TO CONTRACTOR BY ASSIGNEE OF SUBCONTRACTOR—Contractor let out work to subcontractor who in turn ordered material from plaintiff.[1] Subcontractor, needing funds, offered to assign his rights against contractor to defendant bank as collateral. Bank wrote contractor asking him to agree to the assignment and promising in return to pay subcontractor's materialmen. Contractor agreed,[2] the assignment was made, and contractor made all further payments to defendant who refused to pay plaintiff. *Held,* that plaintiff has a cause of action as a donee beneficiary of defendant's promise to contractor.[3] *Washington Steel Form Co. v. North City Trust Co.,* 308 Pa. 351, 162 Atl. 329 (1932).

Third party beneficiaries are customarily classified as creditor, donee or incidental: creditor, when performance of the promise will discharge an obligation of the promisee to the beneficiary; donee, when the purpose of the promisee in obtaining the promise is to make a gift to the beneficiary; and incidental, when neither of the above situations exists yet performance of the promise will benefit the third party.[4] In the instant case plaintiff was not a creditor beneficiary since the contractor, the promisee, was not under any obligation to him.[5] The court treated him as a donee, and, in order to bring the case within the limitation laid down in *Greene County v. Southern Surety Co.,*[6] predicated defendant's liability on the fact that it had "received money for the payment of a debt to another."[7] This solution of the problem is open to considerable criticism. It is doubtful whether plaintiff was a donee beneficiary inasmuch as the contractor's purpose in making the agreement was to benefit himself.[8] Furthermore, even if it is

[10] In Duncan v. United States, 48 F. (2d) 128 (C. C. A. 9th, 1931), the conviction of the defendant for uttering profane language on the radio was properly upheld, on the ground that the provision of the Radio Act prohibiting the use of profanity was within the regulatory power of Congress over interstate commerce.

[1] Under the contract between subcontractor and plaintiff the latter had the right "to decline to make any shipments or perform any service except upon receipt of satisfactory security or for cash."

[2] And notified plaintiff of the agreement.

[3] The assignment was made by means of a sealed contract and since plaintiff was not a party to the assignment, he could not sue on it. Greene County v. Southern Surety Co., 292 Pa. 304, 316, 141 Atl. 27, 32 (1927).

[4] CONTRACTS RESTATEMENT (Am. L. Inst. 1928) § 133; ANSON, CONTRACTS (Corbin's ed. 1930) §§ 288, 289 and 291.

[5] The Act of 1901, P. L. 431, § 2, PA. STAT. ANN. (Purdon 1930), tit. 49, §§ 3 and 4 gives a mechanics' lien only to contractors and subcontractors. Since plaintiff was a materialman of the subcontractor he had no right of lien.

[6] 292 Pa. 304, 141 Atl. 27. The limitation consisted in *dictum* laid down by Justice Kephart at 311 Atl. 30: "Unless the transaction is accompanied by a transfer of property or funds to the promisor, or by unusual circumstances, there are very few instances where recovery has been permitted to a donee beneficiary."

[7] The opinion is not clearly worked out. All the cases cited in support of this statement are creditor beneficiary cases, yet the plaintiff was not a creditor beneficiary and the opinion so states in an earlier paragraph.

[8] Since plaintiff could have stopped work upon learning that subcontractor was in such need of funds as to be using its contract with contractor as collateral security see *supra* note 1, it was obviously to the contractor's advantage to make the agreement it did with defendant bank. The existence of such an agreement would reassure plaintiff and thus tend to secure

assumed that plaintiff was a donee beneficiary, the case does not belong under the above-mentioned limitation, which covers donee situations where there has been the delivery of property *out of which* the promise is to be performed.[9] Here defendant's promise was to pay generally. While it is true that in many cases of this type no specific *res* is necessary,[10] it must be remembered that Pennsylvania has appreciably limited the rights of third party beneficiaries and in donee cases has generally insisted that there be such a *res*.[11] Apparently the court in this instance felt plaintiff was entitled to relief which led them to classify the case with those in which recovery has been granted heretofore. Viewed as a decision allowing donee beneficiaries to recover simply because they are donee beneficiaries, the result is commendable; but the inaccurate classification will do little to remove the existing confusion in the Pennsylvania law on this subject.[12]

CORPORATIONS—FRAUD—RIGHT OF A CORPORATION TO SUE FOR FRAUDULENT REPRESENTATIONS MADE TO ITS PROMOTER—Defendant, president of vendor corporation, by false and fraudulent representations, induced promoter to form plaintiff corporation and cause it to adopt contract made on its behalf by promoter whereby it bought all the assets of vendor corporation in consideration of the creation and issue as to said corporation of all its authorized shares, common and preferred, of $1,330,000 aggregate par value. Vendor corporation contracted to retransfer immediately all the common shares to promoter and his associates.[1] Plaintiff sued in fraud and deceit for damages suffered and defendant moved for nonsuit. *Held,* that the nonsuit be denied. *Nye Odorless Incinerator Corp. v. Felton,* 162 Atl. 504 (Del. Super. 1932).

It has been held that one making false and fraudulent representations to a promoter, intending him to form a corporation to act in reliance thereon, subjects himself to liability to the corporation so acting.[2] However, the plaintiff must show damage.[3] Though the damage in the principal case was only reflected in

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the desired performance from him. Compare the reasoning in the surety-bond-to-pay-materialmen cases where recovery is denied the materialman on an ordinary non-statutory bond given to either a private owner, First M. E. Church v. Isenberg, 246 Pa. 221, 92 Atl. 141 (1914); or a municipality, Greene County v. Southern Surety Co., *supra* note 4, on the theory that the promisee did not intend to make a gift in obtaining the promise.

[9] Applying the phraseology of the limitation in the Greene County case, *supra* note 7, the instant case apparently does not violate its terms, but when the donee cases upon which the limitation is based are considered, *infra* note 11, the scope of the rule is greatly narrowed as noted above.

[10] Grant v. Bradstreet, 87 Me. 583, 33 Atl. 165 (1895); Knowles v. Erwin, 43 Hun 150 (N. Y. 1887); 1 WILLISTON, CONTRACTS (1924) § 370; ANSON, CONTRACTS (Corbin's ed. 1930) § 286.

[11] The three donee beneficiary cases cited by the court are excellent illustrations of this: Hostetter v. Hollinger, 117 Pa. 606, 12 Atl. 741 (1888); Edmundson's Estate, 259 Pa. 429, 103 Atl. 277 (1917); McBride v. Western Pennsylvania Paper Co., 263 Pa. 345, 106 Atl. 720 (1918).

[12] See Corbin, *Third Party Beneficiaries in Pennsylvania* (1928) 77 U. OF PA. L. REV. 1; Note (1928) 76 U. OF PA. L. REV. 594.

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[1] The report of the case does not disclose whether or not the vendor corporation received consideration for the transfer other than the efforts of the promoter in promoting the plaintiff corporation. But in any event, the provision in the contract created an immediate interest in the shares to be issued, and reduced the vendor corporation to a mere channel through which those shares would pass on their way to the promoter. See principal case at 508.

[2] Cortes Co. v. Thannhauser, 45 Fed. 730 (C. C. S. D. N. Y. 1891); Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046 (1898); EHRICH, THE LAW OF PROMOTERS (1916) § 285. See also Mason v. Harris, L. R. 11 Ch. Div. 97 (Eng. 1879).

[3] Adams v. Clark *et al.,* 239 N. Y. 403, 146 N. E. 642 (1925), *rev'g* 208 App. Div. 827, 203 N. Y. Supp. 918 (1924); Sturve v. Tatge, 285 Ill. 103, 120 N. E. 549 (1918); Williams *et al.* v. Sawyer Bros., 45 F. (2d) 700 (C. C. A. 2d, 1930).

a diminution of the book value, and consequently the market price, of the various shares, and hence, in a sense, was borne by the shareholders,[4] yet they suffered the losses as members of the body corporate because of fraud on the association, rather than as individuals themselves defrauded.[5] There would seem to be no just reason for restricting the shareholders to their individual remedies, if any, even though the successful prosecution of the present action would benefit them. This conclusion, of course, is predicated upon the lack of any circumstance that would operate to disclose the various shareholders separately and show them all to be barred from suing.[6] For instance, if the plaintiff in the principal case had bought from the vendor under the same circumstances but the vendor had retained *all* the shares, the vendor would merely have converted its property into a new form and its *alter ego* [7] would have no action for whatever overvaluation there was when the vendor placed itself in position to deal with the property under the provisions of the new incorporation. But, upon the advent of innocent shareholders who were contemplated at the time of the misrepresentations, it would seem that their right of group action against those who harm the group should not be prejudiced merely because some benefit from the suit would inure to culpable associates.[8] For this reason the Court's refusal in the instant case to allow the nonsuit seems proper.

CRIMES—CONSPIRACY—CONSENT OF THE WOMAN TRANSPORTED AS CONSPIRACY TO VIOLATE THE MANN ACT—One of the defendants transported the other with her consent and co-operation from one state to another with the express intention of having illicit sexual intercourse. Both were indicted for conspiring

[4] Even if the entire assets of the corporation would have been insufficient, had the representations been true, to pay anything to the common shareholders on liquidation, their loss is actual since with the business a going concern any shrinkage in assets impairs the fund upon which it operates.

[5] It is to be noted that the representations were made to induce the plaintiff to purchase the assets of the vendor corporation and not to induce anyone to purchase the shares. The shareholders have no cause of action individually for fraud unless they can show that they relied on the representations and were intended by the defendant to rely upon them in the way that they did. See Walker v. Choate, 228 Ky. 101, 14 S. W. (2d) 406 (1929); Gillespie *et al.* v. Hunt *et al.*, 276 Pa. 119, 119 Atl. 815 (1923), *certiorari* denied 261 U. S. 622, 43 Sup. Ct. 519 (1923); Polhill v. Walter, 3 B. & Ald. 114 (Eng. 1832).

[6] This is classically known as "piercing the veil of corporate entity". But the more modern thought regards a corporation as an association of individuals, permitted, by reason of compliance with statutory requirements, to do business under statutory privileges and hence the individual members are at all times "exposed to view". This view of corporations is evidently taken by the American Law Institute Restatement Committee. BUSINESS ASSOCIATIONS RESTATEMENT TENTATIVE DRAFT NO. 1 (Am. L. Inst. 1928) 9.

[7] The term *"alter ego"* is used in deference to the time-honored practice of "disregarding the corporate fiction" and disclosing the corporation to be merely the *alter ego* of *X*. However, if the corporation is thought of as merely a group of individuals transacting business under certain statutory provisions, the fact that the vendor corporation must have been fully cognizant (through the eyes of its officers and agents) of and agreeable to the proposed false valuation obviously should prevent it from asserting its newly acquired privileges as the reason and means for recovering from its "other pocket" what it originally knowingly put in. This result was reached in Stratton's Independence, Ltd. v. Dines, 126 Fed. 968 (C. C. D. Colo., 1904), *aff'd* 135 Fed. 449 (C. C. A. 8th, 1905), *certiorari* denied 197 U. S. 623, 25 Sup. Ct. 800 (1905) (vendor an individual). See also Meyers, Inc. v. Ogden Shoe Co., 173 Wis. 317, 181 N. W. 306 (1921) (associates knew of falseness of representation before plaintiff corporation adopted the contract).

[8] The case of Scholfield Gear & Pulley Co. v. Scholfield, *supra* note 3, is substantially in accord with the principal case. In the cases involving promoter's secret profits the courts have reasoned in the manner adopted by this comment in determining whether or not there was damage for which the corporation could sue. California-Calaveras Mining Co. v. Walls, 170 Cal. 285, 149 Pac. 595 (1915) is practically the exact principal case with the damage caused by secret profits instead of fraud. For other cases see EHRICH, *op. cit. supra* note 3, §§ 120 *et seq.* and cases cited in the notes thereto. It was by analogy to these cases that the court in the principal case arrived at its decision.

to violate the Mann Act.[1] *Held,* that the failure of the Act to condemn the woman's participation in the crime evidenced an affirmative legislative policy to leave her contemplated acquiescence unpunished,[2] and such acquiescence therefore was not indictable as conspiracy.[3] *Gebardi v. United States,* 53 Sup. Ct. 35 (1932).

At common law,[4] where a crime by its very nature requires the assent and co-operation of another party, such action as part of the substantive offense cannot be separately indicted as conspiracy.[5] The rule is properly applied to illegal sales,[6] bigamy,[7] bribery,[8] and duelling.[9] However, as Justice Holmes has pointed out,[10] the interstate transportation of a woman for immoral purposes can be accomplished by force or drugs without her consent, and any co-operation on her part which is not required by the substantive crime could be the subject of conspiracy.[11] But where the judiciary realizes that the legislature must have known

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[1] 36 STAT. 825 (1910), 18 U. S. C. A. §§ 397-399 (1927). Even though, as in the instant case, the defendants have committed the substantive crime, they may still be indicted for the conspiracy. United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682 (1914); Sneed v. United States, 298 Fed. 911 (C. C. A. 5th, 1924).

[2] Where, as here, the woman merely accepts the man's proposition and voluntarily accompanies him, she has been held for purposes of evidence not to be an "accomplice". Hays v. United States, 231 Fed. 106 (C. C. A. 8th, 1916).

[3] If only two, the man and the woman, are indicted for conspiracy, the release of one naturally frees the other. CLARK & MARSHALL, CRIMES (2d ed. 1905) § 136; Williams v. United States, 282 Fed. 481 (C. C. A. 4th, 1922).

[4] Conspiracy as known to the common law is not cognizable as such in the federal courts, United States v. Martin, 4 Clif. 156 (U. S. 1870); the statute defining the crime, 21 STAT. 4 (1879), 18 U. S. C. A. § 88 (1927), requires an unlawful agreement (one to defraud the United States or one to violate a federal law) and an overt act, United States v. Donau, 11 Blatch. 168 (U. S. 1873). However, the rule that the agreement required for the substantive crime may not be separately indicted as conspiracy is applied by the federal courts. United States v. Dietrich, 126 Fed. 664, 667 (C. C. D. Neb. 1904) (bribery); United States v. New York Central & H. Ry. Co., 146 Fed. 298 (S. D. N. Y., 1906) (agreement to give rebates on freight); *cf.* United States v. Grand Trunk Ry., 225 Fed. 283 (W. D. N. Y. 1915); Thomas v. United States, 156 Fed. 897 (C. C. A. 8th, 1907); McKnight v. United States, 252 Fed. 687 (C. C. A. 8th, 1918).

[5] 2 WHARTON, CRIMINAL LAW (12th ed. 1932) § 1604; CLARK & MARSHALL, CRIME (2d ed. 1905) § 134. It will be noticed that the rule properly applies only when the substantive crime requires an agreement or concurrence of will. The theory is that if an agreement is punished as a distinct crime, it may not be called another name, conspiracy, and punished again. Then clearly, the rule does not apply if the substantive offense demands only the physical availability and use of another without their consent; to consummate many crimes a woman is required, yet her consent is not a necessary element of the offense. See *infra* notes 11, 13, 15.

[6] The essence of a sale is an agreement; thus, where it is a crime to sell intoxicating liquor, the agreement to buy is not a conspiracy. United States v. Katz, 271 U. S. 354, 46 Sup. Ct. 513 (1926).

[7] The very essence of the crime of bigamy is the second marriage, which is a contract or agreement, State v. Cooper, 103 Mo. 266, 273, 15 S. W. 327, 329 (1891); such agreement is not conspiracy, therefore.

[8] The crime is not offering a bribe or soliciting one, but the offer *and* acceptance of a bribe: an agreement to act for a consideration which is not conspirary. United States v. Sager, 49 F. (2d) 725 (C. C. A. 2d, 1931); *cf.* Vannata v. United States, 289 Fed. 424, 427 (C. C. A. 2d, 1923).

[9] The crime of duelling includes an agreement to fight as contrasted with an affray which is spontaneous. Commonwealth v. Lambert, 36 Va. 603 (1838); the agreement is not conspiracy to duel. 2 WHARTON, *loc. cit. supra* note 5.

[10] In United States v. Holte, 236 U. S. 140, 35 Sup. Ct. 271 (1915), in which on substantially the same facts as the instant case the defendants demurred. In overruling the demurrer, the majority held they did not think it impossible to convict the woman of conspiracy, while the strong dissent urged the legislative intent not to punish the woman. Approving the dissenting view, see Note L. R. A. 1915D, 281.

[11] The general proposition that if a single person could have committed the offense the prior co-operation of another is conspiracy is well supported in federal law. Thus, where two partners concurred in making false income tax returns for the partnership, it was held that because one could have made the return for both [43 STAT. 280 (1924), 26 U. S. C. A.

of the part played by certain individuals in an evil a statute seeks to destroy, and yet has failed to punish them either because they are victims of the evil or witnesses necessary for effective prosecution, then the courts will not permit such contemplated unpunished activity to be indicted as conspiracy. It is this principle which precludes the prosecution of the infant in statutory rape,[12] the unmarried woman in adultery,[13] and the buyer of intoxicating liquor.[14] Conversely, if the statute punishes the other party, such as the woman upon whom an abortion is performed, then no protective policy exists to prevent an indictment for conspiracy.[15] Since it seems clear that Congress in passing the Mann Act considered even the woman who voluntarily submitted to transportation a victim of unfortunate circumstance, a white-slave who was to go unpunished,[16] the court in the instant case properly protects one whose acts go no further than the contemplated acquiescence. On the other hand, if a woman should take the initiative and promote an interstate excursion as part of a blackmail scheme, she is clearly not one of the recognized victims of white slavery, and consequently should not be entitled to their immunity from punishment.[17]

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§ 965 (1927)], they were guilty of conspiracy. Lisansky v. United States, 31 F. (2d) 846 (C. C. A. 4th, 1929); *cf.* Chadwick v. United States, 141 Fed. 225 (C. C. A. 6th, 1905); United States v. Shevlin, 212 Fed. 343 (D. C. Mass. 1913).

[12] Queen v. Tyrrell [1894] 1 Q. B. 710.

[13] As pointed out in 2 WHARTON, *op. cit. supra* note 5, § 2087, the consent of the unmarried party is not required to constitute adultery; clearly a married man would violate the marital fidelity if the woman were asleep or drugged. Yet for her assent and agreement to the intercourse, unrequired for the substantive offense, she cannot be indicted for conspiracy. State v. Law, 189 Iowa 910, 179 N. W. 145 (1920); State v. Reiners, 80 N. J. L. 196, 76 Atl. 330 (1910); Shannon v. Commonwealth, 14 Pa. 226 (1850).

[14] It was pointed out, *supra* note 6, that the buyer of intoxicating liquor is not held for conspiring to sell because his agreement is the illegal sale itself. However, to transport liquor is a separate and distinct crime, 41 STAT. 308 (1919), 27 U. S. C. A. § 12 (1927), and as this may be done by a single person, the buyer's agreement to aid transportation would logically be a conspiracy. The courts escape this conclusion only because the liquor prohibition laws were directed against the seller alone, the acts of the buyer being arbitrarily declared as not aiding and abetting. Lott v. United States, 205 Fed. 28 (C. C. A. 9th, 1913). Thus, in Norris v. United States, 34 F. (2d) 839 (C. C. A. 3d, 1929) where a New York buyer ordered from a Philadelphia seller arranging for the necessary delivery, the court recognized the expediency of freeing the buyer in order to convict the seller by the thus available evidence, and declared that the buyer could not conspire to transport under a statute that failed in any way to punish him. A criticism of this case, (1929) 43 HARV. L. REV. 317, in relying on certain abortion cases (see *infra* note 15) failed to recognize that the statutes punished the woman herself, and no policy born of legislative omission protected her as it does the buyer of intoxicants or the woman transported in violation of the Mann Act. *Cf.* State v. Teahan, 50 Conn. 92 (1882); Laughter v. United States, 259 Fed. 94 (C. C. A. 6th, 1919).

[15] State v. Crofford, 133 Iowa 478, 110 N. W. 921 (1907); Queen v. Whitechurch, 24 Q. B. D. 420 (1890); *cf.* State v. Owens, 22 Minn. 238 (1875). But see Solander v. People, 2 Colo. 48 (1873).

In most of the cases the issue is whether the woman's testimony requires the corroboration as that of an accomplice. If an "accomplice" is one who could have been indicted for the crime itself, People v. Sweeney, 213 N. Y. 37, 106 N. E. 913 (1914); Diggs v. United States, 220 Fed. 545, 552 (C. C. A. 9th, 1915), and the statutes punish only the "procurer" of the abortion, the woman is not an accomplice. State v. Hyer, 39 N. J. L. 598 (1877); Commonwealth v. Wood, 77 Mass. 85 (1858). Where the statute also punished the woman, it was held that she was an accomplice, Grissman v. State, 93 Tex. Cr. 15, 245 S. W. 438 (1922). *Contra:* State v. McCurtain, 52 Utah 63, 67, 172 Pac. 481, 482 (1918); State v. Jones, 197 S. W. 156 (Mo. 1917).

[16] See the dissent in the Holte Case, *supra* note 10, and 47 H. R. 61st Cong., 2d Session, p. 10 *et seq.*, cited therein.

[17] This was the implication left by Justice Holmes when he considered this hypothetical situation in the Holte Case, *supra* note 10. It is quite understandable as a result of a logical application of the general rule, *supra* note 11, without the protection of a legislative policy which never intended to include such women.

ELECTION OF REMEDIES—ACTIONS FOR DECEIT AND FOR BREACH OF CONTRACT—CONCURRENT CAUSES OF ACTION REQUIRING NO ELECTION—The plaintiff assigned his interest as owner of a new smelting process to a corporation formed by the defendant, upon the defendant's promise to financially support and operate the corporation. The defendant never performed and never intended to perform his obligations. In an action for breach of the contract it appeared that the plaintiff had assigned to another the "cause of action for deceit" but had reserved to himself "any cause of action arising out of the breach of the contract". *Held*, that the pendency of the deceit action was no bar to the present suit. *Continuous Zinc Furnace Co. v. American Smelting & Refining Co.*, C. C. A. 2d, decided Dec. 5, 1932.

The confusion present in most cases involving an election of remedies may be attributed to the absence of a clearly defined terminology. "Cause of action" imports the violation of a legal duty [1] and it may be stated generally that the plaintiff is entitled to compensation for each duty violated. There is no election between causes of action.[2] "Remedy", in contradistinction, refers to the means employed to enforce the right to redress.[3] If the law has created more than one remedy for one cause of action, and if the theories of the remedies are inconsistent, an election is required.[4] The plaintiff is not permitted to occupy inconsistent positions.[5] These propositions, of course, are subject to the rule that one may not receive reimbursement in excess of the loss actually suffered.[6] With this in mind it appears that there are four possible situations to be encountered: (1) where *one* individual violates *one duty* which is protected by two remedies;[7] (2) where *two* individuals violate *one duty* which may, because of several liability, give rise to two remedies;[8] (3) where *two* individuals violate *two duties;*[9] (4) where *one* individual violates *two duties.*[10] Cases in group (1) are the only ones which properly raise the question of election of remedies. The only concern in groups (2) and (3) is to limit the plaintiff to one satisfaction for the loss

[1] Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 161 Ga. 480, 131 S. E. 283 (1926); Zenith Bathing Pavilion v. Fair Oaks S. S. Corp., 240 N. Y. 307, 148 N. E. 532 (1925); Jones v. Main Island Creek Coal Co., 84 W. Va. 245, 99 S. E. 462 (1919).

[2] Brimer v. Scheibel, 154 Tenn. 253, 290 S. W. 5 (1926). But inconsistencies between the ultimate forms of relief sought should be distinguished from the problem raised by inconsistent remedies. See discussion in Frederickson v. Nye, 110 Ohio St. 459, 144 N. E. 299 (1924).

[3] Cockburn v. Kinsley, 25 Colo. App. 89, 135 Pac. 1112 (1913); Berry v. Donovan & Sons, 120 Me. 457, 115 Atl. 250 (1921); Ross v. Pacific S. S. Co., 272 Fed. 538 (D. C. D. Ore. 1921).

[4] Jaloff v. United Auto Indemnity Exch., 120 Ore. 381, 250 Pac. 717 (1926); Pacific Steamship Co. v. Peterson, 278 U. S. 130, 49 Sup. Ct. 75 (1928).

[5] Brady v. State Ins. Co., 100 Neb. 497, 160 N. W. 882 (1916); McMahon v. McMahon, 122 S. C. 336, 115 S. E. 293 (1921); Grizzard v. Fite, 137 Tenn. 103, 191 S. W. 969 (1916).

[6] See Farber v. Demino, 254 N. Y. 363, 173 N. E. 223 (1930); Commercial Casualty Ins. Co. v. Knutsen Motor Trucking Co., 36 Ohio App. 241, 173 N. E. 241 (1930); Apple v. Owens, 48 F. (2d) 807 (C. C. A. 5th, 1931).

[7] For example where plaintiff's property has been converted he may waive the tort and sue in assumpsit; or where a violation of a duty by a public utility subjects it to an action for breach of the contract and to an action in tort. See (1931) 80 U. OF PA. L. REV. 315.

[8] For example where *A* and *B* become jointly and severally liable on an obligation and fail to perform.

[9] For example, where *A* by deceit induces the plaintiff to lend money to *B*. The deceit by *A* violates one duty, and *B's* failure to repay violates another. The Union Central Life Insurance Co. v. Schidler, 130 Ind. 214 (1891); Goldberg v. Dougherty, 39 N. Y. Sup. 189 (1875).

[10] For example, where a bailee for hire negligently causes injury to the property and in addition fails to pay for the hire. The duty to exercise reasonable care in protecting the property and the duty to pay for the hire are here both violated. It is to be noted that the violation of each duty has caused separate damage.

incurred. The instant case falls within (4) in that *one* defendant has violated *two duties, i. e.* the duty not to misrepresent,[11] and the duty to perform the terms of the contract.[12] Two causes of action have arisen but it appears that the two judgments will be identical to a great extent.[13] That the law does permit multiple judgments, in many cases where there can be but one satisfaction, no doubt would have justified the court in allowing the plaintiff to secure two judgments.[14] But *quære:* should the analogy be applied where it permits of *separate* ownership of two judgments capable of only one satisfaction,—an entirely novel situation? The court might well have refused to countenance an allocation of judgments which tends to foster a conflict of interests conducive to future disputes.

EVIDENCE—ASSIGNMENTS—ADMISSIBILITY AGAINST ASSIGNEE OF ASSIGNOR'S "ADMISSION" MADE AFTER ASSIGNMENT WHEN ASSIGNOR RETAINS AN INTEREST IN PROCEEDS—An alleged assault victim assigned his "right, title and interest in and to" his claim,[1] except fifty dollars, and authorized assignee to make full settlement of the case. In an action on the claim, defendant offered affidavit of assignor, made after assignment, to the effect that defendant had struck him in self-defense. The assignor was not a witness, and there was no evidence that he was unavailable. *Held,* that assignor's affidavit was admissible against assignee. *Lake v. Moots,* 244 N. W. 693 (Iowa 1932).

The hearsay rule rejects statements offered testimonially to assert the truth of the facts they state, if such statements have not been in some way subjected to the test of cross-examination.[2] Admissions, made out of court by a party to a suit, if offered assertively against him, satisfy the hearsay rule.[3] In such a case the declarant cannot complain of lack of opportunity to cross-examine himself—he knows how honest his statement was, and under what circumstances he made it, and he now as opponent has the full opportunity to put himself on the stand and explain his assertion. However, the admissions of an assignor made before assignment, when offered against the assignee, are repugnant to the hearsay rule, inasmuch as the assignee is in need of, but is not afforded, an opportunity to cross-examine the assignor.[4] Such statements, therefore, can only properly be

[11] The deceit action is based upon the defendant's misrepresentation as to his intent to perform his obligations. This represents an interesting extension of the rule that a representation of an intention to pay for goods is a representation of fact and if false will support an action in deceit. Swift v. Rounds, 19 R. I. 527 (1896).

[12] *Cf.* Kirschmann v. Lediard, 61 Barb. 573 (N. Y. 1872), wherein damages were imposed for failure to form a corporation to buy and market a patent.

[13] In a deceit action the plaintiff seeks damages for what he has lost; in a contract action he seeks damages for benefits that would have accrued. 3 WILLISTON, CONTRACTS (1920) §§ 1338-1523. Since the value of the process was completely destroyed the court properly noted that, "to the extent that the damages . . . may prove identical there can be but one satisfaction."

[14] *Cf.* Bowen v. Mandeville, 95 N. Y. 237 (1884); Whittier v. Collins, 15 R. I. 90 (1885); Talcott v. Friend, 179 Fed. 676 (C. C. A. 7th, 1909).

[1] Iowa, by statute, provides that all causes of action survive. Iowa Code (1931) § 10957. Under this statute, a cause of action for a personal tort has been held to be not only survivable, but assignable. Dunshee v. Standard Oil Co., 165 Iowa 625, 146 N. W. 830 (1914).

[2] Dysart Peerage Case, L. R. 6 App. Cas. 503 (1881); Farmers' Bank v. Whitehill, 16 S. & R. 89 (Pa. 1827); United States v. Macomb, 5 McLean 286 (1831). 3 WIGMORE, EVIDENCE (1923) § 1362.

[3] They are universally deemed admissible against the party who made them. Ross. v. Salminen, 191 Fed. 504 (C. C. A. 1st, 1911); Lehigh Valley Nat. Bank v. Ott, 235 Pa. 565, 84 Atl. 507 (1912); *In re* Hoyt, 180 Iowa 1250, 163 N. W. 430 (1917).

[4] Since the assignor is not a witness, the assignee has no opportunity to put him upon the stand to explain his assertion.

admitted as exceptions to the hearsay rule.[5] While these pre-assignment statements are usually admitted, courts do not so classify them.[6] Many simply proceed on a theory, that, since the assignor when he made the statement had an interest, his statement, being adverse to his interest, is unlikely to be false[7]—that there is a "circumstantial guarantee of trustworthiness."[8] Usually, however, in addition to a "circumstantial guarantee of trustworthiness," there is the requirement that the necessity for admitting declarations against interest must be shown, *i. e.*, that the declarant must be shown to be unavailable.[9] If statements are admitted purely on the grounds that they are declarations against interest there seems little justice in dispensing with the requirement of proving the necessity.[10] Public policy is probably the real reason for admitting these pre-assignment admissions, in violation of the hearsay rule, rather than a mere coincidental likeness to "declarations against interest."[11] The third party, since he had a right to use such evidence before assignment, should not be deprived of that right by assignment.[12] Moreover, to exclude such admissions would encourage collusive sales of choses in action. Where, however, as in the instant case, the assignor's admissions are made after assignment, they should be, and usually are,[13] excluded. In such a case, the reasons for receiving the admissions, when made before assignment, fail. Since there has already been a total sale,[14] excluding statements made after the

[5] It might be argued that, since the assignee asserts his claim through his pleadings and the testimony of his witnesses, the assignor's admissions are offered merely to discredit his claim (not as asserting the truth of the facts they state). But, though offered merely to discredit, still, in order to discredit, they must be offered assertively. *B's* statement that "event *X* did not occur", can only discredit *A's* claim that "event *X* occurred", provided *B's* statement is true, that is, provided event *X* did not occur.

[6] Moreover text writers apparently do not so classify them. See 2 WIGMORE, *op. cit. supra* note 2, § 1080.

[7] See Guy v. Hall, 3 Murph. 150 (N. C. 1819); Gibblehause v. Stong, 3 Rawle 436 (Pa. 1832); Instant Case at 695.

[8] See 3 WIGMORE, *op. cit. supra* note 2, §§ 1422, 1457.

[9] See 3 WIGMORE, *op. cit. supra* note 2, §§ 1421, 1456.

[10] The reason for admitting statements circumstantially guaranteed to be true, as exceptions to the hearsay rule, is the fact that, unless we accept them, we shall lose the benefit of the declarant's testimony, which might be very valuable, and is very unlikely to be false.

[11] It has been argued, as the court in the instant case apparently argued at 695, that "an assignee must recover through the title of the assignor, and succeeds to that title only as it stood at the time of transfer", and that therefore the assignee takes the title, burdened with all incumbrances (including the assignor's declarations) which existed at the time of transfer. But to say that the assignor's declarations are incumbrances on the title begs the question, for only on the assumption that such declarations are admissible, would the *title* be incumbered.

[12] A third party's rights should never be prejudiced by an assignment. It is regrettable that, in order to avoid the possibility of the third party being deprived of such evidence, it is necessary to allow him to bring it in without summoning the assignor. This is due to the bad, but generally accepted, view (see 3 WIGMORE, *op. cit. supra* note 2, §§ 902, 903) that one cannot bring in outside evidence to contradict the testimony of his own witness. Smith v. Dawley, 92 Iowa 312, 60 N. W. 625 (1894). Under this view, if the third party is forced to summon the assignor, he may be deprived altogether of the use and effect of the assignor's prior admissions, if the assignor testifies on the stand contrary to his former admissions. To allow a party to introduce statements as evidence, if he does not bring the declarant, who is available, into court, but to refuse to admit the statements, if he presents the declarant as a witness, is one of the many anomalies in the law of evidence, the purpose of which is to get the truth before the jury in the best manner possible.

[13] Harley v. Fireman's Fund Ins. Co., 245 Fed. 471 (W. D. Wash. 1913); Reinecke v. Gruner, 111 Iowa 731, 82 N. W. 900 (1900).

[14] If an intention be manifested that the assignee shall enforce the entire claim against the debtor, and having done so, shall retain part for himself and turn over the remainder to the assignor, there is in contemplation of law a *total assignment*, so far as the collection of the claim is concerned. The assignee is *dominus* of the whole claim and becomes trustee of a portion of the proceeds after collection. Cress v. Irvine, 163 Iowa 659, 145 N. W. 325 (1914).

sale does not deprive the third party of any rights,[15] nor does it encourage collusive sales. The mere retention by the assignor of an equitable interest in the proceeds, while indicating that his statement is against that interest, should not, unsupported by any public policy, be sufficient to overcome the usual rule that the speaker must be proved unavailable.[16]

INCOME TAX—SPENDTHRIFT TRUSTS—ALIENABILITY OF INCOME FROM TESTAMENTARY TRUST WHERE WILL SPECIFIES IT SHALL NOT BE LIABLE FOR DEBTS—*T* created a trust fund and directed that the income be paid to the beneficiaries "directly upon their separate order and receipt—for their sole and separate use" and that it was not to be liable for their debts. *X*, a beneficiary, assigned his interest in the income, and the Board of Tax Appeals decided that the income was no longer taxable to *X*. *Held*, that the will created a spendthrift trust, the income of which was not assignable by the beneficiary, and therefore was still taxable to him. *Commissioner of Internal Revenue v. Blair*, 60 F. (2d) 340 (C. C. A. 7th, 1932).

Where a testator in establishing a trust in the income from property, provides that it shall be free from the debts of the beneficiary and that he may not assign, it is upheld without question as a spendthrift trust in those states which are favorable to spendthrift trusts.[1] It is clear that the purpose of the testator is to prevent the beneficiary from wasting the income, and the courts are willing to effectuate this intention because of the proprietary right of the settlor to do as he pleases with his property so long as he does not contravene established public policy.[2] Where the instrument says the income shall not be assignable by the beneficiary but says nothing about the claims of creditors, the courts infer that the purpose of the testator is to prevent wasting, and hold that he intended the income to be free from the beneficiary's debts, this being necessary to carry out the purpose.[3] Conversely, the trust is upheld where, as in the principal case, the instrument says the income shall be free from debts but says nothing about the right of the beneficiary to assign.[4] Here again the court feels that it is

[15] If the admissions are after assignment, the third party never had a right to use them against the assignor.

[16] Since there is a total assignment, the assignor, though he keeps an interest, is not a party to the suit.

[1] 26 AM. & ENG. ENCY. LAW (2d ed. 1904) 138; Nunn v. Titche-Goettinger Co., 245 S. W. 421 (Tex. 1922).

[2] Nichols v. Eaton, 91 U. S. 716 (1875); Broadway Nat. Bank v. Adams, 133 Mass. 170 (1881); Spann v. Carson, 123 S. C. 371, 116 S. E. 427 (1923).

[3] Commerce Trust Co. v. Bayles, 273 S. W. 759 (Kan. 1925) (Will provided that income was to be paid "only" to beneficiary and her personal receipt taken, and the court said to permit the estate to be taken for debts would destroy the very purpose of the testator); Smith v. Towers, 69 Md. 77, 14 Atl. 497 (1888) (Will required the trustee to pay the income into the beneficiary's hands and the court said it would be impossible to carry out the terms of the trust if creditors were allowed to claim); Roberts v. Stevens, 84 Me. 325, 24 Atl. 873 (1892); Partridge v. Cavender, 96 Mo. 452, 9 S. W. 785 (1888).

[4] Eaton v. Boston Safe Deposit & Trust Co., 240 U. S. 427, 36 Sup. Ct. 391 (1916); Hopkinson v. Swaim, 284 Ill. 11, 119 N. E. 985 (1918) (Here there was a prohibition against subjection to creditor's claims, but none against assignment. It was held non-assignable and the court said the intention of the testator to make the income non-assignable could be inferred, saying also, "There could be no such exemption from liability for debt if the beneficiary could convey or assign the income"); see Jones v. Harrison, 7 F. (2d) 461, 465 (C. C. A. 8th, 1925) ("This results from the fact that an estate put in trust, and expressly restricted as to creditors, sufficiently evidences an intention by the testator to impose a restriction also upon the beneficiary's power to alienate or encumber. . . . The converse of this is also true. A restriction as to the beneficiary's power to alienate will protect a trust against

carrying out the settlor's intent to create a spendthrift trust. In view of the prevailing income tax law, trust instruments might be drawn providing that the income shall be free from debts and also that the beneficiary shall specifically have the right to assign. In such cases it is clear that the purpose of the settlor is not to prevent wasting by the beneficiary but to prevent an involuntary assignment only. Here the courts refuse to uphold the purpose of the settlor, on the ground that no spendthrift trust is created.[5] It is true that the purpose of the settlor does not conform to that present in the ordinary spendthrift trust, but the proprietary right of the settlor exists in this case as in any other. Such a trust might well be upheld whether it be called a spendthrift trust or not, unless the court feels that to carry out to that extent the settlor's right to dispose of his property as he chooses would be opposed to public policy.[6]

INSURANCE—STANDARD MORTGAGEE CLAUSE—EFFECT OF MORTGAGOR'S REBUILDING UPON MORTGAGEE'S RIGHTS UNDER POLICY WHERE INSURER FOREGOES OPTION TO REBUILD—Plaintiff mortgagee sued defendant insurer on a policy

creditors"); see Nunn v. Titche-Goettinger Co., *supra* note 1, at 423 ("In all other cases cited an examination of the instrument . . . discloses provisions reasonably sufficient to raise the issue of whether a spendthrift trust with its attending features of inalienability and exemption was intended"); see Estes v. Estes, 255 S. W. 649, 650, 651 (Tex. 1923) (Court said to create a spendthrift trust there must be a provision against subjection to creditor's claims either express or implied, and that such trusts are not subject to alienation).

[5] Croom v. Ocala Plumbing & Electric Co., 62 Fla. 460, 57 So. 243 (1911); Sparhawk v. Cloon, 125 Mass. 263 (1876); Hallett v. Thompson, 5 Paige 583 (N. Y. 1836); *Re* Estate of Morgan, 223 Pa. 228, 72 Atl. 498 (1909), 25 L. R. A. 236 (1910) ("The right of alienation was given the donee . . . and this of itself defeats the attempted trust". Note, however, that an equitable fee was given in this case). *Cf.* Ames v. Clarke, 106 Mass. 573 (1871) (Where an annuity was created and the will directed that the fund while in the hands of the executor was not to be subject to annuitant's debts; he assigned and the executor paid it to the assignee. In an action on the executor's bond, it was held that there was no liability, since the assignment had not been rescinded); see Hull v. Palmer, 213 N. Y. 315, 320, 107 N. E. 653, 654 (1915) (Trust to pay income and to pay corpus when beneficiary should be able to pay his debts from other sources. Beneficiary was discharged in bankruptcy; corpus was paid to him; bankruptcy proceedings were reopened and assignee attempted to attach for creditors. The court, in holding that he could not do so, said, "It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors"); see Boston Safe Deposit & Trust Co. v. Luke, 220 Mass. 484, 485, 108 N. E. 64, 65 (1915), where the will created a trust fund to pay the income to the beneficiary free from the claims of creditors, it did not pass to an assignee in bankruptcy. The court said that even though the interest might be assignable this would still be true. In Eaton v. Boston Safe Deposit & Trust Co., *supra* note 4, the Supreme Court affirmed the result reached by the Massachusetts court on an appeal taken by the trustee in bankruptcy. The court intimated that the position taken by the court, to the effect that the interest would not pass to the trustee even if it were assignable, was too broad, saying, "There would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts".

[6] In Nichols v. Eaton, *supra* note 2, in answering an objection to a spendthrift trust, the court said that since all instruments creating them are recorded, a creditor knows that he has no right to look to them for payment, and he is neither mislead or defrauded by excluding him from the benefits of such a trust. See also 26 AM. & ENG. ENCY. LAW (2d ed. 1904) 140. This applies equally as well to a trust which is protected from creditors but which gives the beneficiary the right to assign. In Spann v. Carson, *supra* note 2, the court said that a creditor has no right to complain if his debtor has acquired a certain interest which has cost the creditor nothing but which he cannot attach. In Griswold, *Reaching the Interest of a Beneficiary of a Spendthrift Trust* (1929) 43 HARV. L. REV. 63, 97, the author says, in criticism of an indication by the New York court (in Matter of Kirby, 113 App. Div. 705, 100 N. Y. Supp. 155 (1906)) that a statute allowing the beneficiary to assign is unconstitutional: "Certainly the beneficiary is injured in no way, nor does he object. The trustee is not deprived of any interest by the assignment of the beneficiary. And the settlor cannot be invalidly deprived of property which is no longer his own, especially in the usual case where he is dead when the issue arises".

containing a standard mortgagee clause.[1] The policy contained a provision giving the insurer an option to rebuild the premises upon election expressed within thirty days after filing of proof of loss. After a fire, upon insurer's failure to express an election, the premises were rebuilt to their former condition by the mortgagor. The defendant contended that by virtue of the repairs the plaintiff's interest had suffered no loss entitling him to payment under the policy. By statute,[2] a mortgagee to whom insurance moneys are due has the option of either applying it to rebuilding the premises or to a reduction of the mortgage indebtedness. *Held* (two Justices dissenting), that mortgagee might recover notwithstanding the replacement of his security. *Savarese v. Ohio Farmers' Ins. Co.*, 260 N. Y. 45, 182 N. E. 665 (1932).

Inclusion of standard mortgagee clause in an insurance policy, rather than making the mortgagee a mere appointee of funds payable thereunder, effects separate insurance of the mortgagee's interest[3] in unimpairment of his security[4] which is unaffected by acts of the mortgagor.[5] The exercise of the option to rebuild, which is given the insurer by the reinstatement clause, is a condition subsequent[6] to the obligation to pay damages for the loss occasioned by the risk insured against. Accordingly, in the instant case, the insurer was unable to divest itself of its obligation to pay damages for loss under the policy since it failed to express its election to exercise its option to rebuild. Under the policy, loss was payable sixty days after filing of proof of loss.[7] The dissenting justices contended that since the property had been restored by that time, the insured (mortgagee) suffered no loss.[8] Liability of the insurer, however, as distinguished from the insured's right to maintain suit against the insurer, is not dependent upon the expiration of such period.[9] Furthermore, damages are determinable as of the time of the fire.[10] The insured's right to recover for the impairment of his security *as of the time of the fire* could not therefore be defeated by subsequent

[1] The form of the standard mortgagee clause is as follows: "Loss or damage, if any, under this policy, shall be payable to ..... as mortgagee, as interest may appear, and this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, . . ." Instant case at 50, 182 N. E. at 666; SUNDERLIN, FIRE INSURANCE (1928) c. 34, p. 16.

[2] N. Y. REAL PROP. LAW (1909) § 254 (4).

[3] The inclusion of a standard mortgagee clause gives a mortgagee the same benefit as if he had taken out a separate policy of insurance. Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141 (1878); Syndicate Ins. Co. v. Bohn, 65 Fed. 165 (C. C. A. 8th, 1894); Smith v. Ins. Co., 25 R. I. 260, 55 Atl. 715 (1903); 2 COOLEY, BRIEFS ON INSURANCE (1927) 1269. See (1926) 11 CORN. L. Q. 553.

[4] The insurable interest of a mortgagee is the total security for the mortgage indebtedness. It is for indemnity for a decrease in the value of the security that the mortgagee insures. Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 358 (1873). SUNDERLIN, *op. cit. supra* note 1, at c. 34, p. 7.

[5] National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509 (1891); Hardy v. Lancashire Ins. Co., 166 Mass. 210, 44 N. E. 209 (1896).

[6] Aetna Ins. Co. v. Phelps, 27 Ill. 71 (1862); Union Ins. Co. v. McGookey, 33 Ohio St. 555 (1878); 7 COOLEY, *op. cit. supra* note 3, at 6557; 7 COUCH, CYCLOPEDIA OF INSURANCE LAW (1930) § 1770, n. 3.

[7] Instant case at 54, 182 N. E. at 667.

[8] *Id.* at 61, 182 N. E. at 670.

[9] Proofs of loss and the period of grace for payment by the insurer are conditions precedent to the bringing of an action as distinguished from the liability of the insurer which is immediate upon the occurrence of the contingency insured against. Wilson v. German-American Ins. Co., 90 Kan. 355, 133 Pac. 715 (1913); Lebanon Mut. Ins. Co. v. Erb, 112 Pa. 149, 4 Atl. 8 (1886); 7 COOLEY, *op. cit. supra* note 3, at 5741.

[10] The measure of damages is the difference between the value immediately before and the value immediately after the fire. Tinsley v. Aetna Ins. Co., 199 Mo. App. 693, 205 S. W. 78 (1918). See also RICHARDS, INSURANCE (2d ed. 1895) 39, 139.

acts of third parties, including the mortgagor, in replacing the security when under no obligation so to do.[11] Nor should the mortgagor's act result in his subrogation to the mortgagee's rights since he is a mere volunteer.[12] Subrogation would also be tantamount to forcing the mortgagee to rebuild and would contravene the intention of the statute in giving the sole dispositive determination of insurance moneys to the mortgagee.[13] While the plaintiff was ultimately made whole, the decision is not inconsistent with the principle that the purpose of insurance is to indemnify, inasmuch as it is established that the diminution of the insurable interest is to be determined as of the time the loss occurs.[14]

SALES—LIABILITY ON WARRANTY OF RESTAURATEUR FOR WHOLESOMENESS OF FOOD SERVED TO A GUEST—Plaintiff brought an action in assumpsit for breach of an implied warranty to recover damages for illness caused by a poisoned pork sandwich served by defendant restaurant keeper. *Held,* that the plaintiff could recover as there was a sale of the food with an implied warranty of wholesomeness. *West v. Katsafanas,* 162 Atl. 685 (Pa. Super. 1932).

From the time of *Parker v. Flint* [1] it has been generally held that the title to food served by a restaurateur does not pass, but that the transaction partakes of a service.[2] Many modern courts, however, influenced by a desire to hold the restaurateur absolutely liable for the wholesomeness of the food he serves, find

[11] In Foster v. Equitable Mutual Fire Ins. Co., 68 Mass. 216 (1854) where a policy payable to mortgagor was assigned to the mortgagee who agreed with the insurer to pay future assessments it was held that a new policy was created between the insurer and the mortgagee. The court in that case stated, at 220: "Plaintiff had an insurable interest in the property; the defendants agreed to insure it against loss by fire and a loss has occurred. The contingency contemplated by the contract has therefore arisen, and the defendants are bound to pay the amount of the damage. It is wholly immaterial to them, and constitutes no valid defense to this suit that the property has since been repaired." See also Aetna Ins. Co. v. Baker, 71 Ind. 102 (1881); Lindemann v. American Insurance Co., 217 Mich. 698, 187 N. W. 331 (1922); 8 COUCH, *op. cit. supra* note 6, §§ 2159, 2161. Note the *per curiam* opinion in Calnon v. Fidelity Phenix Ins. Co., 114 Neb. 53, 58, 207 N. W. 528 (1925). But see Mathewson v. Western Assurance Co., 10 L. C. R. 8 (Canada, 1859); CAMERON, FIRE INSURANCE (1909) 121. See Note (1928) 28 COL. L. REV. 202, 207. In Huey & Philp v. Ewell, 22 Tex. Civ. App. 638, 55 S. W. 606 (1900) the mortgagor was permitted to recover the insurance as against the mortgagee. In that case however the mortgagor had covenanted to repair for the benefit of the mortgagee.

[12] The equity of subrogation will not extend in favor of a mere volunteer who without any duty, moral or otherwise, pays the debt of another. McKinnon v. New York Assets Realization Co., 217 Fed. 339 (C. C. A. 2d, 1914); SUNDERLIN, *op. cit. supra* note 1, at c. 32, p. 3; VANCE, INSURANCE (2d ed. 1930) 673. See Huey & Philp v. Ewell, *supra* note 11.

[13] *Supra* note 2. Justice Lehman in his dissent to the instant case denies that moneys are due to the mortgagee because the property has been restored prior to the expiration of 60 days from filing of proof of loss. *Cf.* notes 9 and 10 *supra.* Even he admits, however, that if the money *were* payable to the mortgagee, the option of rebuilding would be solely in the mortgagee. Instant case at 59, 182 N. E. at 669.

[14] "Indemnification is commensurate with . . . insurable interest at time of loss." RICHARDS, *op. cit. supra* note 10, 39. A contract of property insurance is construed as strictly indemnitory in its nature. Thacher v. Aetna A. & Liability Co., 287 Fed. 484 (C. C. A. 8th, 1923); Kiefer v. Girard F. & M. Ins. Co., 285 Pa. 589, 132 Atl. 706 (1926); COUCH, *op. cit. supra* note 6, at 10. But "the doctrine of indemnity has not been allowed to obtrude itself inconveniently, provided the contract of insurance is free from suspicion of being a wager at the time of its inception." RICHARDS, *op. cit. supra* note 10, at 176.

[1] 12 Mod. 254 (1701) in which it was said that the innkeeper "does not sell but utters his provisions". The issue in this case was not whether the innkeeper should be held as a warrantor of the food he serves but whether soldiers could be quartered with one who serves food. The case of Saunderson v. Rowles, 4 Burr. 2064 (1771) draws the analogy between a victualler and an innkeeper, and relying on Parker v. Flint, holds that in neither case does the transaction partake of a sale of goods.

[2] Valeri v. Pullman Co., 218 Fed. 519 (S. D. N. Y. 1914); Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533 (1914); Nisky v. Childs Co., 103 N. J. L. 464, 135 Atl. 805 (1926); BEALE, THE LAW OF INNKEEPERS AND HOTELS (1906) § 169.

that a sale has occurred [3] and attach an implied warranty of wholesomeness.[4] In justifying this departure from the old rule the courts cite the modern conditions and methods of service where the patron pays for a definite portion of food,[5] and conclude that there is no logical distinction between the restaurant keeper [6] and retailer who is held to impliedly warrant that the food he supplies is wholesome.[7] Professor Williston,[8] however, using a better approach, has suggested that whether or not there is a sale the restaurant keeper should be liable as a warrantor [9] since the relation between restaurateur and patron is one of contract for service of food and an implied condition thereof is that the food and drink furnished be appropriate for eating.[10] A sale is not the only transaction in which a warranty may be implied [11] and the reason for implying a warranty, *i. e.* public interest in the preservation of health,[12] is more potent in the case of a restaurant keeper who has more opportunity to provide against deleterious food than the retailer who has nothing whatever to do with the preparation of the food.[13] From the viewpoint of public policy and the extreme difficulty of proving negligence in these cases, the imposition of an absolute liability is desirable; and is justified for the same reason that one who chooses to engage in an ultra-hazardous activity is held absolutely liable.[14] Whether the transaction be viewed as a sale or a service, the principal case is commendable for bringing Pennsylvania into line with the more liberal authority on this point.

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[3] Temple v. Keeler, 238 N. Y. 344, 144 N. E. 635 (1924); Smith v. Gerrish, 256 Mass. 183, 152 N. E. 318 (1926); *cf.* Nisky v. Childs Co., *supra* note 2. See note (1918) 32 HARV. L. REV. 71.

[4] One who sells food for immediate consumption impliedly warrants that it is wholesome. Flessher v. Carstens Packing Co., 93 Wash. 48, 160 Pac. 14 (1916); Race v. Krum, 222 N. Y. 410, 118 N. E. 853 (1918); Jackson v. Watson & Sons, [1909] 2 K. B. 193; 2 MECHEM, SALES (1901) § 1356. *Cf.* UNIFORM SALES ACT § 15 (1).

[5] Heise v. Gillette, 83 Ind. App. 551, 149 N. E. 182 (1925); Commonwealth v. Phoenix Hotel Co., 157 Ky. 180, 162 S. W. 823 (1914). In those restaurants which have cafeteria or automat service it seems clear that the food is sold; see Valeri v. Pullman Co., *supra* note 2; see (1919) 7 CALIF. L. REV. 360.

[6] Smith v. Carlos, 247 S. W. 468 (Mo. App. 1923). The distinction practically vanishes in those cases where restaurants supply food to patrons who carry it away and consume it elsewhere. Greenwood v. Thompson, 218 Ill. App. 371 (1919).

[7] *Supra* note 4.

[8] 1 Williston, Sales (2d ed. 1924) § 242 (b).

[9] Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407 (1918); Leahy v. Essex Co., 164 App. Div. 903, 148 N. Y. Supp. 1063 (1914). It is interesting to note that although the court in the instant case cites Williston at 685, nevertheless decides the issue on the ground that there is a sale and therefore the defendant is liable on an implied warranty.

[10] Year Book, 9 Henry VI, 53: "If I go to a tavern to eat, and the taverner gives and sells me meat and it is corrupted, whereby I am made very sick, action lies against him without any express warranty, for there is a warranty in law", cited and followed in Wallis v. Russell, [1902] 2 Irish Rep. 611. Barringer v. Ocean S. S. Co., 240 Mass. 405, 134 N. E. 265 (1922).

[11] Friend v. Childs Dining Hall Co., *supra* note 9; WILLISTON, *op. cit. supra* note 8. See Note (1929) 42 HARV. L. REV. 414.

[12] Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210 (1897); Smith v. Carlos, *supra* note 6; see Nock v. Coca Cola Bot. Wks., 102 Pa. Super. 515, 519, 156 Atl. 537, 538 (1931); (1928) 26 MICH. L. REV. 461.

[13] Greenwood v. Thompson, *supra* note 6; Barrington v. Hotel Astor, 184 App. Div. 317, 171 N. Y. Supp. 840 (1918); Note (1932) 9 N. Y. U. L. Q. REV. 360.

[14] It has been suggested that those who chose to engage in a business of supplying food to the public whose normal use would result, with reasonable certainty, in personal harm to the user, if not properly made, should bear the risk incident to that business which is an insurer's liability. Parks v. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); see (1916) 25 YALE L. J. 679. For the analogy between an innocent misrepresentation and liability without fault see (1932) 81 U. OF PA. L. REV. 94. See also Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Case* (1930) 78 U. OF PA. L. REV. 805, 811.

TORTS—RELEASE—RELEASE OF TORTFEASOR AS BAR TO CLAIM AGAINST ATTENDING PHYSICIAN FOR MALPRACTICE—An injury sustained by plaintiff through the negligence of one Doran was aggravated by the malpractice of defendant, the attending physician. Subsequently plaintiff gave Doran a valid release of all claims arising out of the original accident, and then instituted this action for malpractice against the physician who treated her. *Held,* that the release of Doran constituted a good defense. *Seymour v. Carroll et al.,* 182 N. E. 647 (Ohio App. 1932).

In the absence of negligence on the part of the injured person in selecting a physician,[1] the tortfeasor is liable for all aggravated injuries resulting from the physician's negligence.[2] The instant case is based on this rule, the reasoning being that there can be but one recovery for one injury,[3] and that, the injured person having an enforceable claim against the tortfeasor for his aggravated injuries, the release discharges all claims which he has on account of such injuries. Although a number of cases have followed this reasoning,[4] there has been a tendency of late to hold that a release given the tortfeasor will not inure to the benefit of the negligent physician, on the ground in some cases that his negligence created a new injury rather than aggravated the old one,[5] and in others that the negligence of the physician is always a separate act for which he should be held liable.[6] There is a great deal of merit in this line of decisions, because the rule which holds the tortfeasor liable for the aggravated injuries caused by the physician's negligence is something of an anomaly;[7] the tortfeasor and the physician are not joint wrongdoers, since their negligences operate independently to produce the final injury,[8] which is really the sum of two injuries,[9] instead of their acting in

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[1] Stover v. Bluehill, 51 Me. 439 (1863); Tuttle v. Farmington, 58 N. H. 13 (1876); Loeser v. Humphrey, 41 Ohio St. 378 (1884). But where one procures a physician to attend a person whom he has injured and uses due and reasonable care in the selection of such physician, he is not liable for the negligence or unskillfulness of the latter which results in an aggravation of the original injury, on the ground that the physician is neither an agent nor a servant, but an independent contractor. Secord v. St. Paul, M. & M. Ry., 18 Fed. 221 (C. C. Minn. 1883); Pittsburg, C. C. & St. L. Ry. v. Sullivan, 141 Ind. 83, 40 N. E. 138 (1895); Louisville & N. Ry. v. Foard, 104 Ky. 456, 47 S. W. 342 (1898); see Andrews v. Davis, 128 Me. 464, 148 Atl. 684 (1930).

[2] Pullman Palace Car Co. v. Bluhm, 109 Ill. 20 (1884); Sauter v. New York Cent. R. Co., 66 N. Y. 50 (1876); Wallace v. Pennsylvania Ry., 222 Pa. 556, 71 Atl. 1086 (1909); *cf.* Thompson v. Louisville R. Co., 91 Ala. 496, 8 So. 406 (1890); Bush v. Commonwealth, 78 Ky. 268 (1880). TORTS RESTATEMENT (Am. L. Inst. 1932) § 332.

[3] See Edmondson v. Hancock, 40 Ga. App. 587, 151 S. E. 114 (1929); Hooyman v. Reeve, 168 Wis. 420, 170 N. W. 282 (1919).

[4] Guth v. Vaughan, 231 Ill. App. 143 (1923); Wells v. Gould, 160 Atl. 30 (Me. 1932); Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796 (1911); Martin v. Cunningham, 93 Wash. 517, 161 Pac. 355 (1916); Retelle v. Sullivan, 191 Wis. 576, 211 N. W. 756 (1927). These courts totally ignore the cases holding that a release running specifically in favor of one person cannot be extended to cover other persons, neither named nor referred to therein. See Secor v. Tradesmen's Nat. Bank, 148 App. Div. 141, 133 N. Y. S. 197 (1911).

[5] Andrews v. Davis, *supra* note 1; Purchase v. Seelye, 231 Mass. 434, 121 N. E. 413 (1918).

[6] Staehlin v. Hochdoerfer, 235 S. W. 1060 (Mo. 1921); Parkell v. Fitzporter, 301 Mo. 217, 256 S. W. 238 (1923); Hoffman v. Houston Clinic, 41 S. W. (2d) 134 (Tex. Civ. App. 1931) (Workmen's Compensation Act); see dissent in Martin v. Cunningham, *supra* note 4, at 521, 161 Pac. at 357.

[7] See TORTS RESTATEMENT, *loc. cit. supra* note 2, comment (b).

[8] The court in the instant case speaks of them as "concurrent wrongdoers severally liable", 182 N. E. at 649, but this phrase means nothing. In Wells v. Gould, *supra* note 4, at 31, the court says: "This is true [the result of the instant case], though the wrongdoers are severally, rather than jointly, liable for the injury". But is is generally held that a party to whom a release has been given or with whom a settlement has been made must be one of two or more joint tortfeasors in order to discharge the others from liability. Pittsburg Ry. v. Chapman, 145 Fed. 886 (C. C. A. 3d, 1906); Drinkhouse v. Van Ness, 202 Cal. 359, 260 Pac. 869 (1927); Thomas v. Central R. R. N. J., 194 Pa. 511, 45 Atl. 344 (1900); Brimer v. Scheibel, 154 Tenn. 253, 290 S. W. 5 (1926). *Contra:* Cox v. Maryland Elec. Ry., 126 Md. 300, 95 Atl. 43 (1915).

concert to produce a single indivisible injury, which is the case in a joint tort. Furthermore, it often happens, either because of lack of knowledge of the law,[10] or because the full results of the physician's negligence have not yet become apparent,[11] that the injured party grants the release for a smaller consideration than he would otherwise demand. It is as a result of such injustices resulting from this rule that it has been deserted in some recent cases;[12] some states have taken an even more extreme step, and have, by legislative action, abrogated the common-law rule that the release of one joint tortfeasor releases all,[13] an action which can be supported on the same grounds of policy as are advanced against the rule of this case. Not being bound by any precedents, the court in the instant case might well have followed this more liberal modern trend.

WORKMEN'S COMPENSATION—INJURY SUSTAINED WHILE GOING TO WORK AS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—Plaintiff, on way to work, sustained injuries in front of employer's cafeteria when she slipped on a sidewalk made icy by washing of his windows. When plaintiff fell she was twenty feet from the only entrance to the cafeteria. *Held* (three Judges dissenting), that the injury was compensable under the Workmen's Compensation Act since it "arose out of and in the course of employment." [1] *Barnett v. Britling Cafeteria Co.*, 143 So. 813 (Ala. 1932).

The opinions of the divided court illustrate the divergent views of the authorities in determining, first, whether an injury sustained by an employee in going to work is *in the course of* employment, and, second, if the employment is proved, whether a street injury, as slipping on an icy pavement, is one which *arises out of*

[9] The physician's negligence is separate, and he can be held liable for it without affecting the liability of the tortfeasor for the injury caused by his negligence. Kallach v. Hoagland, 239 Fed. 252 (C. C. A. 6th, 1917); Holtzman v. Hoy, 118 Ill. 534, 8 N. E. 832 (1886); Mason v. Geddes, 258 Mass. 40, 154 N. E. 519 (1926); see Pike v. Honsinger, 155 N. Y. 201, 49 N. E. 760 (1898); Stemons v. Turner, 274 Pa. 228, 117 Atl. 922 (1922).

[10] Knowledge of the law would enable the injured party to reserve in the release the right to sue others jointly liable, in which case most courts interpret it as a covenant not to sue, and hold that it does not bar a subsequent action. Berry v. Pullman Co., 249 Fed. 816 (C. C. A. 5th, 1918); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); Eden v. Fletcher, 79 Kan. 139, 98 Pac. 784 (1908); Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 122 N. W. 499 (1909). *Contra:* Abb v. Northern Pac. Ry., 28 Wash. 428, 68 Pac. 954 (1902); McBride v. Scott, 132 Mich. 176, 93 N. W. 243 (1903); Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181 (1912).

[11] There is no decided case in which the physician's negligence occurred after the giving of the release, but such a case would probably be governed by the application of the rule that a release ordinarily covers all such matters as may fairly be said to have been within the contemplation of the parties when it was given, and no others. New York County Nat. Bank v. Helm-Campbell Co., 109 N. Y. S. 673 (1908); Crum v. Pennsylvania Ry., 226 Pa. 151, 75 Atl. 183 (1910); see Miller v. Perlroth, 95 Conn. 79, 110 Atl. 535 (1920). Thus it is held that a release by an injured person will not cover a particular injury existing at the time of the giving of the release, but unknown then to the parties, at least if such injury is of so serious a character as to indicate that, if it had been known, the release would not have been signed. Texas & Pac. Ry. v. Dashiell, 198 U. S. 521, 25 Sup. Ct. 737 (1905); Mix v. Downing, 176 Minn. 156, 222 N. W. 913 (1929); see Och v. Missouri, K. & T. Ry., 130 Mo. 27, 31 S. W. 962 (1895). *Contra:* Kansas City Southern Ry. v. Armstrong, 115 Ark. 123, 171 S. W. 123 (1914).

[12] See cases cited *supra* notes 5 and 6.

[13] ALA. CODE (Michie, 1928) § 7669, as interpreted in Smith v. Gayle, 58 Ala. 600 (1877); MO. REV. STAT. (1929) § 3268; W. VA. CODE (1931) c. 55, art. 7, § 12.

[1] The pleadings of the cause in the trial court were unusual. The plaintiff alleged a common law action. The defendant, in his answer, set up the Workmen's Compensation Act in bar of the common law action. Plaintiff's demurrer thereto was overruled and on appeal to this court, the ruling was sustained. Judgment was ordered for the defendant.

the employment.[2] It is said to be established that "street risks", hazards to which the public as a whole is exposed, cannot be the subject of compensable injuries inasmuch as no causal connection exists between the employment and the risk.[3] But progressive courts have abandoned this harsh rule,[4] and the majority, in the principal case, in terming the street injuries compensable, adopted the more advanced view. The more difficult problem confronting the court was in determining whether the injury had been sustained in the course of employment. As a general rule, an employee going to or from his place of work is not in the course of his employment as will permit recovery under the Compensation Acts.[5] However, exceptions have limited considerably the magnitude of this principle.[6] Thus, compensation is awarded in situations where the employer supplies the means of transportation,[7] where the injury is sustained on the premises of the employer,[8] or on such immediately adjacent premises as are customarily, with the consent of the employer, used as a means of ingress or egress to his place of business.[9] In the instant case, the use by the employer of the sidewalk as the only means of ingress and egress for employees and patrons, and for the purpose of washing the windows of the premises, tends strongly to indicate that, though the sidewalk was a public highway, it was, as a matter of fact, used by the employer as a part of his premises.[10] Moreover, the fact that plaintiff sustained her injury but a few

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[2] *In the course of* employment refers to the time, place, and circumstances of the accident; *arising out of* employment indicates a general causal relationship between the injury-producing accident and the employment. The two elements are conjunctive and both must be satisfied. Bryant v. Fissell, 84 N. J. L. 72 at 76, 86 Atl. 458 at 460 (1913); McNicol's Case, 215 Mass. 497, 102 N. E. 697 (1913); Fitzgerald v. Clarke, [1908] 2 K. B. 796, 799; HONNOLD, WORKMEN'S COMPENSATION (1918) § 101; see (1928) 78 U. OF PA. L. REV. 442.

[3] McNicol's Case, *supra* note 2; Walker v. Hyde, 43 Idaho 625, 253 Pac. 1104 (1927); Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 N. W. 325 (1915); DeVoe v. New York Railways, 218 N. Y. 318, 113 N. E. 256 (1916); SCHNEIDER, WORKMEN'S COMPENSATION (2d ed. 1932) § 262; see (1929) 4 TULANE L. REV. 308; *cf. In re* Harraden, 66 Ind. App. 298, 118 N. E. 142 (1917). But where an injury is sustained during employment which requires continual use of highways as with salesmen, chauffeurs, collectors, *etc.*, the injury arises out of the employment. Pierce v. Providence Clothing, *etc.*, Co. [1911] 1 K. B. 997; Morse v. Port Huron Co., 251 Mich. 309, 232 N. W. 369 (1930).

[4] Eagle River Bldg., *etc.*, Co. v. Industrial Commission, 199 Wis. 192, 225 N. W. 690 (1929); Johnston v. Nott Co., 183 Minn. 309, 236 N. W. 466 (1931); Burchett v. Anaconda Copper Co., 48 Idaho 524, 283 Pac. 515 (1929); Redner v. Faber & Son, 180 App. Div. 127, 167 N. Y. Supp. 242 (1917); (1929) 29 COL. L. REV. 1027. See especially New Amsterdam Cas. Co. v. Hoage (Ct. of App. D. C.), *U. S. Daily*, Dec. 9, 1932.

[5] Lake v. Bridgeport, 102 Conn. 337, 128 Atl. 782 (1925); Whitney v. Hazard Lead Works, 105 Conn. 512, 136 Atl. 105 (1927); Hills v. Blair, 182 Mich. 20, 148 N. W. 243 (1914); HONNOLD, *op. cit. supra* note 2, at § 107.

[6] Employment is not limited to the exact moment when the worker reaches his place of work or when he ceases work, and it necessarily includes a reasonable time and space before and after ceasing actual employment, having in mind all the circumstances. Wabash Ry. v. Industrial Commission, 294 Ill. 119, 128 N. E. 290 (1920); Note (1927) 49 A. L. R. 424.

[7] Flanagan v. Webster & Webster, 107 Conn. 502, 142 Atl. 201 (1928); Wells v. Cutler, 90 Colo. 111, 6 P. (2d) 459 (1931); Nicol v. Young's Paraffine, *etc.*, Co., 8 B. W. C. C. 395 (Eng. 1915) (employee under control of employer). But where employee by such transportation furthers his own business, the employer is not liable. Norwood v. Tellico River Lumber Co., 146 Tenn. 682, 244 S. W. 490 (1922).

[8] Sedlock v. Carr Coal Mining Co., 98 Kan. 680, 159 Pac. 9 (1916); Northwestern Fuel Co. v. Swanson, 197 Wis. 48, 221 N. W. 396 (1928); HONNOLD, *op. cit. supra* note 2, at § 109; SCHNEIDER, *op. cit. supra* note 3, at § 268; Note (1927) 49 A. L. R. 424.

[9] Feeney v. N. Snellenburg & Co., 103 Pa. Super. 284, 157 Atl. 379 (1931); Northwestern Fuel Co. v. Swanson, *supra* note 8; Sloss-Sheffield Steel & Iron Co. v. Thomas, 220 Ala. 686, 127 So. 165 (1930). ". . . Employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer." Bountiful Brick Co. v. Giles, 276 U. S. 154, 48 Sup. Ct. 221 (1928); (1929) 7 TEX. L. REV. 185.

[10] See Bountiful Brick Co. v. Giles; Feeney v. N. Snellenburg & Co., *supra* note 9. The term "premises of his employer" should not be construed to be limited to the soil over which

feet away from the point at which her employment began, namely, the entrance, is an added incentive to the awarding of compensation.[11] While the facts in the instant case are somewhat unusual, the attitude of the majority court in refusing to be bound by arbitrary distinctions when called upon to interpret modern social legislation, is refreshing.

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he has legal title or dominion, but to that which he uses, to all intents and purposes, as his own premises. Northwestern Fuel Co. v. Swanson, *supra* note 8. "The fact that the employee in leaving [and entering] the premises was following the usual and customary route is ordinarily considered of weight in deciding that the accident has taken place in the course of employment." Wabash Ry. v. Industrial Commission, *supra* note 6, at 293.

[11] Northwestern Fuel Co. v. Swanson, *supra* note 8 (employee injured 50 feet from place of employment, held: liability); Hallett's Case, 232 Mass. 49, 121 N. E. 503 (1919) (employee fell at the entrance of employer's store, held: liability); see (1922) 28 A. L. R. 1408, at 1413. See also Cudahy Packing Co. v. Parramore, 263 U. S. 418, 44 Sup. Ct. 153 (1923) *aff'g* 60 Utah 161, 207 Pac. 148 (1922), where the employee was found to be in the course of his employment when run over by an engine at a railroad crossing 100 feet away from the place of employment. See Simonson v. Knight, 174 Minn. 491, 219 N. W. 869 (1928) (injury to cook while approaching restaurant's rear door entrance customarily used by employees, held: compensable). But *cf.* Krebs v. Industrial Commission, 200 Wis. 134, 227 N. W. 287 (1929), where an employee was injured 20 feet from the entrance to employer's plant and the injury was held not compensable. But this was an interpretation of the peculiar Wisconsin statute, which provides that the injury must be sustained on the employer's premises. See also Wiles v. American Oil Co., 105 Pa. Super. 282, 161 Atl. 467 (1932).